NO. 957-967

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

FREDERICK J. MACLEOD and EVERETT E. STONE, Constituting the PUBLIC SERVICE COMMISSION OF MASSACHUSETTS,

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Certiorari to Supreme Court of Massachusetts.

and

DAKOTA CENTRAL TELEPHONE COMPANY,

vs.

STATE OF SOUTH DAKOTA, ex rel., BYRON S. PAYNE, as Attorney General, et al.

Writ of Error to Supreme Court of South Dakota.

BRIEF AMICI CURIAE OF THE SEVERAL STATES AND NATIONAL ASSOCIATION OF RAILROAD AND PUBLIC UTILITY COMMISSIONERS.

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STATEMENT.

This brief is presented in behalf of thirty-seven states of the Union, represented by the several public service commissions, and by the National Association of Railway and Utilities Commissioners. All of the states except five had conferred juris-

diction upon public service commissions over telephone companies. The existing state laws vary somewhat in their language, but they are substantially alike. In general they confer upon the utility commissions the power to regulate all persons, firms, corporations, receivers and lessees engaged in the operation of telephones for hire, and their services, practices, accounting, rates and charges in intrastate commerce, as well as the ability to prevent discrimination and preference between persons and locations.

The issue in the pending South Dakota and Massachusetts cases presents questions of vital concern to the people of every state in the Union. Briefly stated, it is as follows:

Does the joint resolution of Congress deprive the states of their right to regulate the rates of telephone companies which are being temporarily operated by the Government as a war measure, especially in view of the fact that actual hostilities with foreign nations have ceased, and that we are not menaced by invasion, insurrection or rebellion?

This nation is not now engaged in actual warfare. As a result of the armistice the German Government surrendered such a large portion of its war equipment as to render itself apparently unable to renew the conflict and has permitted the occupation by the Allied troops of large and valuable portions of its territory. Our troops are being speedily demobilized; many of the Government agencies created during the war have been disbanded and we are fast approaching a normal peace basis. At this

writing the peace representatives of the German Government are assembled in Versailles to receive the peace terms of the Allies.

Unusual significance should be attached to the announcement made by the Postmaster General that he has recommended the return of the cable systems not later than May 2nd. This is an admission that there is no war emergency. If Government operation of communicating systems between foreign countries ceases on May 2nd, it naturally follows that the Government should promptly release the control and operation of the telephone and telegraph systems.

The telephones were taken over by the Government August 1st and the Hon. Albert S. Burleson, Postmaster General, was placed in charge. The President's proclamation included all telephone companies, but Mr. Burleson immediately released the rural lines. At an early date he announced the policy of standardizing toll and exchange rates and committees were appointed to investigate and report schedules of rates. The standard toll rates inaugurated by Mr. Burleson in December were to become effective January 21st. Substantial increases were made in intrastate rates without complying with state laws. State utility commissions were not requested to investigate or approve the reasonableness of the new schedule. Many states sought to secure relief by court proceedings. In this connection it may be stated, although the precise rates are not involved in the pending case, that the Postmaster General has also increased local or ex-

change intrastate rates in a large number of cases without the sanction of state regulating authorities.

When Congress passed the wire resolution there were over 10,000 telephone companies in the United States. These were divided into three general classes—rural or farm lines—local exchange properties—and toll lines. Generally speaking, the service of rural and exchange properties is local and the messages between subscribers are not transmitted over interstate lines. A substantial per cent of toll business is between points wholly within a state. The rural lines were built and are being maintained by local capital, and the same rule applies to a great many exchanges.

Congress had knowledge of these facts. It is therefore earnestly contended that Congress did not intend to deprive the states of the right to regulate these local companies, or to take from the people the existing remedy against unjust rates and service secured by the laws of the several states. If Congress had intended to place the sole and unrestricted authority in the President it would have said so in language that is not open to debate.

This is not a Suit Against the United States.

The controversy is not of a political nature, nor does it extend to the constitutional rights or authority of the President. In so far as the President is concerned here it is by reason of the power delegated to him by Congress and the question as to the extent of the power delegated is not affected by his political office or standing. As said by Chief Jus-

tice Marshall, in *Marbury* v. *Madison,* 5 U. S. (1 Cranch.) 137, 166-171: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety of judicial interference is to be determined."

This action is not brought to interfere with the property of the telephone company. It is not brought to interfere with or control the exercise of discretion or authority on the part of any officers or agents of the executive department of the Government, as to those duties which the law requires them to perform and as to those matters which come within their jurisdiction. It is to enjoin such officers or agents from acting unlawfully, and as to matters concerning which they are given no jurisdiction or authority under the act.

That such an action is within the jurisdiction of the courts—either state or federal—is amply sustained by the authorities.

The leading case is that of *United States* v. *Lee,* 106 U. S. 196, which has been followed by a long line of authorities. The case was ejectment. The defendants were military authorities, holding property at Arlington, Virginia, under the direction of the President, as a military station and a national cemetery, and it was alleged not only that the defendants were acting under the direction of the Executive Department, but that their possession was the possession of the United States. Accordingly the Attorney General appeared, insisting that the court had no jurisdiction and the action should be

dismissed. As was said by Mr. Justice Miller, delivering the opinion of the Supreme Court:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power."

The jurisdiction of the court was sustained. It was held that the court was competent to decide the issues before it, and having found that title was in the plaintiff, and having rendered judgment against the defendants, its judgment was affirmed. It was said in the opinion:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it. * * *
>
> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority and without any compensation, because the President has ordered it and his officers are in possession?
>
> "If such is the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and protection of personal rights.
>
> "It cannot be, then, that when, in a suit between two citizens for the ownership of real

> estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'stop here; I hold by order of the President, and the progress of justice must be stayed!' "

Another case, having a direct bearing upon the point under discussion, is that of *Osborn* v. *U. S. Bank,* 9 Wheat. 738. The case was this: The State of Ohio having levied a tax upon the branch of the bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the State of Ohio, was about to proceed to collect said tax by seizure of the money of the bank in its vaults, and an amended bill alleged that he had seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the state treasurer.

One of the objections to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a party to the bill, was the real party in interest; that all the parties sued were her officers, concerning acts done in their official character and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued that what could not be done directly could not be done by suing her officers. It was insisted that, while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction.'

The Supreme Court of the United States affirmed the decree ordering a restitution of the money, and, in its opinion said:

> "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford him could his principal be joined in the suit."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, is an important authority upon this branch of the case. In that case suit was instituted in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing original proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. It was alleged in the bill that the lines were established by the secretary unlawfully, although authority therefor was claimed under a

certain Act of Congress. The bill was demurred to and one of the grounds of demurrer was that "This is virtually a suit against the United States." Upon that point it was said in the opinion:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully evaded. (Cases cited.) And in the case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Cases cited.) And it is equally applicable to a federal officer acting in excess of his authority or under an authority nor validly conferred."

It is important to note also that the controversy is not removed from the sphere of the judicial power simply because it relates to actions claimed to have been directed to a war end. If the mere fact of an alleged war purpose makes a controversy inherently non-justiciable, the principle would apply with greatest force to the action of military commanders under the direction of the commander-in-chief. For while Congress may declare war, it is to the President, as commander-in-chief, to whom is committed, by the Constitution, the direction of military operations. This broad authority, for the actual conduct of the war may not be impaired, even by Congress itself. (*Milligan's case*, 4 Wall. 2, 139.)

Yet, even in the actual zone of conflict, when a military commander takes private property to prevent it falling into the hands of the enemy, or for the purpose of converting it to the public use, the urgent necessity which justified this course is the proper subject of inquiry by the courts. If such necessity is found not to exist, such military commander is a trespasser and cannot justify by showing the orders of his superior officer. The alleged war purpose, even in the actual conduct of campaigns, does not make the controversy non-justiciable or oust the courts of jurisdiction to inquire whether the property of the citizen has been invaded rightfully. *Mitchell* v. *Harmony,* 13 How. 115.

It is also established that a controversy with respect to the lawfulness of the action of a naval officer in seizing a ship is none the less justiciable because he was acting under the direct instructions of the President. *Little* v. *Barreme,* 2 Cranch. (U. S.) 170.

In this case it was held that instructions from the President, to a naval officer, to seize property illegally, did not protect the officer from damages. The officer had seized a Danish brigantine under suspicion of violating the Act of Congress, known as the non-intercourse law. The fifth section thereby authorized the President to give instructions to the commanders of the public armed ships of the United States to stop and examine vessels of the United States under certain circumstances. The President issued explicit instructions, which, however, were found to go beyond the authority conferred by the

Act of Congress. Mr. Chief Justice Marshall, in delivering the opinion of the court, said:

"These orders which were given by the executive under instructions of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the Act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an Act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce the suspicion that the vessel was *American,* would excuse the captor when the vessel appeared in fact to be neutral.

"I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was very much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. * * * I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against the government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

The foregoing authorities seem to us to conclusively establish the proposition that a suit brought to enjoin the unlawful exercise of authority, even though it be directed against an executive officer of the government, is not a suit against the United States. Especially is this true when no such officer is made a party and the suit is directed only against a corporation, permitted to do business under and subject to the laws of the state.

The Joint Resolution Conferred No Power Over Intrastate Rates.

The power to regulate intrastate telephone rates, without complying with the laws in relation thereto, is claimed to be based upon a certain provision contained in the Joint Resolution of Congress of July 16, 1918. The provision referred to is as follows:

> "The President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange or ratification of the treaty of peace."

The most striking feature of this provision, in reference to the claim mentioned, is the entire absence of language which in terms confers such power. The rate making power is of such importance that the granting of it has always heretofore been the

occasion of much controversy. When the power has been granted it has been surrounded with adequate safeguards. It has never been constitutionally granted in this country without the establishment of standards by the legislative body itself.

Notwithstanding these facts the court is now asked to hold that Congress intended to and did confer this power as a mere incident to the possession and control of the telephones. As this court has so often said in substance: If Congress had intended to convey this tremendously important power it would have said so in the most unequivocal language. The strongest argument that it did not intend so to do is the entire absence of such language.

Clearly the possession of such power was not necessary to enable the President to meet the emergency through which the country was passing. Rapidity and secrecy in the transmission of government communications was of course essential, as was also the closing of the wires to uses which would aid the enemy. Those matters were provided for and it seems to us that those were the matters which Congress had in mind when it passed the Joint Resolution.

This is indicated by the language employed. The President was authorized "to take possession and assume control" of the wires. The resolution did not stop there. Yet if the government's contention is to be upheld it might have done so, as it is claimed that the words quoted were all embracing. Congress added the significant words, "and to operate

the same in such manner as may be needful or desirable for the duration of the war." By the addition of these words it was shown that the control was for the purpose of operation and was limited to the operation of the wires. If that is not so, then the addition of the words regarding operation were entirely superfluous.

The Power of Rate Regulation Could Not Be Constitutionally Conferred Upon the President.

The power claimed for the President is open to the constitutional objection which seems to us to be insuperable. It is well established that the regulation of rates is a legislative function. *Milwaukee Elec. R. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 180. As such it cannot be delegated to the President or any other executive officer. *Field* v. *Clark,* 143 U. S. 649, 692. Therefore, even if the Joint Resolution were intended by Congress to confer authority on the President to regulate intrastate rates, it did not accomplish such purpose in a constitutional manner and accordingly did not accomplish it at all.

Effect of the Proviso on the Power Conferred by the Joint Resolution Considered.

Apparently to remove all possibility of misconstruction, Congress added a proviso to the Joint Resolution. The proviso is as follows:

> "Provided further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such

laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

In considering this proviso, it is well to call attention, at the outset, to the fact that it is not intended to confer the right to exercise the police power upon the several states, because such power is inherent in them and not in Congress. It has never been surrendered to the Federal Government, and therefore there was no need for Congress to authorize its continued exercise.

Tenth Amendment U. S. Constitution.

South Carolina v. *United States,* 199 U. S. 437.

Keller v. *United States,* 213 U. S. 138.

The power of each state to regulate the rates to be charged for public utility service performed wholly within the state is beyond question. The power is often called the police power. When it is exercised by the enactment of laws, or orders of administrative bodies, those laws and orders are usually called police regulations.

The term police regulation is no narrower than the term police power. This is shown by the statement, in the case of *Chicago B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, that "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

It is further shown by the following quotation

from the opinion in the case of *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* rendered by this court on March 24, 1919, reported on page 116 of U. S. Supreme Court Advance Opinions No. 6:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state *in the exercise of its police power. Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis, Superintendent of Insurance of the State of Kansas,* 233 U. S. 289, 407." (Italics ours.)

And further:

In *Reagan* v. *Trust Co.,* 154 U. S. 413, 417, Justice Brewer used this language:

> "We are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

In the case of *Sligh* v. *Kirkwood,* 237 U. S. 52, at page 58, Mr. Justice Day said:

> "The limitations upon the police power are hard to define and its far reaching scope has been recognized in many decisions in this court. * * * The police power in its broadest sense includes all legislation and almost every function of civil government. It is not subject to definite limitations, but is co-extensive with the interests of the case and the safeguards of public interest. * * * It embraces regulations designed to promote public convenience or the

general prosperity or welfare as well as those specially intended to promote the public safety or the public welfare. * * * It is the most essential of powers, at times the most insistent and always one of the least limitable of the powers of government."

"The police power is the broadest in scope of any field of governmental authority. It is inherent in the very nature of organic society. * * * It is as limitless as man's aspirations, and conception of human welfare and its exercise is likewise limitless where not fundamentally restrained."

State v. *Donald,* 151 N. W., 331, 369 (Wis.).

See also the case of

Hammer v. *Dagenhart,* 247 U. S. 251.

As early as the case of *C. & N. W. R.* v. *Fuller,* 17 Wall. 560, it was held that railroad regulatory legislation was an exercise of the police power. In that case the Supreme Court of the United States had before it an act of the legislature of Iowa requiring railroad companies to fix their rates for the transportation of freight and passengers and publish those rates and cause a printed copy of them to be posted in all stations and depots, the copy to remain posted during the year. The court said:

"It is not, in the sense of the constitution, in any wise a regulation of commerce. *It is a police regulation* and as such forms a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves." (Italics ours.)

It is thus evident that the term "police power" has been used in both the sense of the protection of

the public health, safety, and morals, and of the public convenience, and the general welfare, and that the term "police regulations" has no other or different meaning than "police power." It is simply used to designate all regulations that may be made under the exercise of "police power," whether relating to the public health, safety, morals, convenience, or general welfare, and includes the regulation of public utilities as to their rates and charges, and all like matters which directly concern the public welfare. Laws regulating the rates and charges of public service corporations were passed in response to an insistent public protest against unreasonable and excessive charges and discriminatory practices. The protection secured to the people through the various state laws and regulating commissions has been substantial. Indeed, the regulation of rates has largely occupied the attention of officers for many years, resulting in preventing rebates, discrimination, and the adoption of schedules of reasonable charges. It seems plain, therefore, that Congress, by including this proviso in the Joint Resolution, has expressly recognized the right of the states to insist upon a compliance with the state law relating to changes in intrastate rates.

No claim can be successfully urged that such compliance will affect the transmission of government communications within the meaning of the proviso.

The claim is made that, if the proviso is construed to mean that the right to regulate intrastate rates is reserved to the states, it would possibly prevent the President from obtaining sufficient revenue to enable the telephones to be kept in an efficient condition and would thereby affect such transmission.

Such would not be the case. It would only mean that the President must obtain authority to secure necessary additional revenue on intrastate business through the several state commissions. That this would not be impracticable nor unduly burdensome is shown through the one practical application which it has had. We refer to the increase in express rates of July 1, 1918, which had been ordered on interstate traffic by the Interstate Commerce Commission. Application for a like increase was made by telegraph to the various state commissions and the increase was promptly granted, as requested, by all except five states. These five states have since granted such increases, subject to certain modifications necessary to meet local conditions.

The argument that the various states might refuse requested increase and thus create confusion, loses sight of the fact that the standard of rates in the various states and interstate commerce is the same; that is to say, just and reasonable rates. Such being the fact, it cannot be assumed that the state commissions will fail to perform their duty and authorize any rates which are not just and reasonable.

Legislative History.

We have attached to this brief, as Appendix A, extracts from the Congressional Record showing portions of the debate on the Telephone Resolution. It is clear from a perusal thereof that Congress did not think that it was conferring any rate regulatory power whatever upon the President; and that it intended to leave such matters for subsequent legislation should an occasion arise for its enactment.

Applicability of Present State Laws.

It is claimed that the reservation to the states of their existing laws or powers in relation to "taxation or the lawful police regulations" is of no effect because no state has ever enacted any law applicable to telephone companies which are operated by the Federal Government; that until the power is exercised by the passage of appropriate legislation, no state law is being violated.

Carrying this proposition to its logical conclusion, it would follow that no state in the Union today could tax the property or earnings of telephone companies under Federal control, nor could such state take any action against said companies for the protection of the health, convenience, or welfare of its citizens. Its power to regulate the location of poles, wires and cables, to require reasonable service, and proper extension, and all such matters would have to rest in abeyance until suitable legislation could be passed by the state.

To assert the proposition is to deny it. Congress had knowledge of the large body of police legislation in the various states. In the Joint Resolution Congress said in effect:

The President may take over the control and operation of the telephones and operate them, but nevertheless nothing shall be done by him which shall amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the states.

Congress was dealing with existing laws and in-

tended by said provisions to preserve unimpaired that large and useful field of legislation, regulation, and practices which have developed during the past thirty-five years.

It seems to us that the argument that the present state laws are inapplicable is answered by the decision of this court, that the United States is a corporation. *Chisholm* v. *Georgia,* 2 U. S. 419. All of the state laws expressly apply to telephone systems operated by corporations and individuals. Therefore, if it be held that the railroads are operated by the government they are operated by a corporation; and if they are held to be operated by the President, then they are being operated by an individual. In either case the operation comes within the provision of the state law.

It is not an answer to the argument to say that the term *corporations,* as used in the various state regulatory laws, was not intended to mean corporations such as the United States, because it was not contemplated that the United States would ever operate the railroads. This is so for the reason that the state laws were passed long after the decision referred to, with a presumptive knowledge of a broad scope of the word and yet its application was not confined, in the various acts, to corporations organized under the laws of the various states or of Congress.

It was held in the case of *Smyth* v. *Ames,* 169 U. S. 466, and *Reagan* v. *Mercantile Trust Company,* 154 U. S. 413, that the state regulatory laws applied to railroads operated by corporations organized

under the laws of Congress, although at the time of the passage of the acts the only railroads operating in the United States were those organized under the state laws.

The fact that the government was not operating the telephone systems at the time of the passage of the state laws would not necessitate the placing of a restricted meaning upon the word corporation. On the contrary, it should be given its broad meaning wherever that is necessary to carry out the apparent purposes of the act as is the case here.

This course has been uniformly applied by this court in construing the Federal constitution. As an example of such construction, attention is called to the meaning given to the word commerce. It has been held to apply to communication by telephone and telegraph and various other instrumentalities, although they were not in existence at the time the constitution was adopted, and could hardly have been said to have been within the contemplation of the framers of that document.

Where the state laws expressly apply to lessees of telephone systems, the case is even stronger for it is now almost uniformly held that the relationship existing between the telephone systems and the government is that of lessor and lessee. In such cases then the argument of the plaintiff in error would necessarily fall.

We submit the rule to be that even as to the governmental purposes of such agency, the local laws will control unless Congress, for the purpose of protecting such agency in its governmental pur-

poses, has by appropriate and reasonable legislation protected such agency from state interference. This rule flows from and is based upon the public powers of the state and its sovereign control over its local and domestic affairs.

A clear statement of the general rule is taken from the Encyclopedia of Supreme Court Reports, Vol. 4, at page 204:

> "A corporation organized under the laws of the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from Congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations."

See also

Reagan v. *The Mercantile Trust Co.*, 154 U. S. 413.

Thomson v. *Union Pacific*, 76 U. S. 579-590.

Conclusion.

Because of the foregoing principles and authorities, the judgment of the Supreme Court in the State of South Dakota should be affirmed and the judgment of the Supreme Judicial Court of the State of Massachusetts should be reversed.

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PUBLIC SERVICE COMMISSION OF NEVADA.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY.

STATE CORPORATION COMMISSION OF NEW MEXICO.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District of New York.

CORPORATION COMMISSION OF NORTH CAROLINA.

PUBLIC UTILITIES COMMISSION OF OHIO.

PUBLIC SERVICE COMMISSION OF OREGON.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND.

RAILROAD COMMISSION OF SOUTH CAROLINA.

RAILROAD COMMISSION OF TEXAS.

PUBLIC SERVICE COMMISSION OF VERMONT.

PUBLIC SERVICE COMMISSION OF WASHINGTON.

PUBLIC SERVICE COMMISSION OF WYOMING.

PUBLIC UTILITIES COMMISSION OF UTAH.

BOARD OF NORTH DAKOTA RAILROAD COMMISSIONERS.

West Virginia Public Service Commission.

APPENDIX A.

In the discussion of the legislative history of the telephone resolution, the page numbers refer to the Congressional Record, Volume 56. The resolution was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. (Page 9368.) On July 2nd the resolution was transferred to the Committee on Military Affairs.

Following are portions of the debate which bear upon the congressional purpose in regard to the regulation of telephone rates:

> "Mr. Bankhead (p. 9470): There is one matter that has not been touched on in general debate, and that is a practical proposition—the regulation of rates and tolls to be charged in the event the President should see fit to take them over. *What did the committee have in mind along that line?*
>
> Mr. Snook (of Ohio, a member of the committee): I will be glad to answer the gentleman. The committee had in mind treatment of that subject as we treated the railroad situation. This is simply a resolution to empower the President, in case the necessity arises, to take over the telegraph and telephone systems. Then if he does that, Congress will exercise the power that it did in the railroad matter, and fix the rates and determine the way in which the matter should be handled. * * * (Referring to the committee hearings.) In his (the Secretary of the Navy) opinion, he thought it would be necessary, if we continued in the war, that the government should have a right to exercise a control over the people who were sending these messages, the employes of the telegraph companies; otherwise there might be danger of secrets or plans by which the government was

All reference to The Congressional Record which are made in this brief are to the advance sheets and not the bound volumes.

carrying on the war leaking out and being disclosed."

On the same day, July 5, 1918, (see Congressional Record, p. 9473), the last part of the resolution was introduced by Mr. Montague.

Mr. Sims said (Congressional Record, July 5, 1918, p. 9475):

"But looking at the resolution, which is in the exact language, word for word, of the act of 1916 under which the railroads were all taken over, and then considering the great railroad-control bill as we did for many weeks, in which every question pertaining in nature and substance to this resolution was discussed, I thought it would be an assumption on my part to repeat at great length in a report information which everybody knows. * * *

"I am not prepared to say that it will not become necessary, but I hope it will not become necessary, and if it does not it will not be done. Therefore there was no use in a long program of detailed legislation as to the operation, as to the compensation, in advance of whether or not it would ever become necessary to consider such legislation. If it is found necessary by the President to exercise the power herein conferred, as a matter of course Congress will do as it did in the railroad-control matter. There will be supplementary legislation to take care of every question that will arise, and it will not be railroaded through the House without ample time for consideration.

"Mr. Walsh: Will the gentleman state what that urgent necessity is?

Mr. Sims: It has been mentioned in the public press that a strike has been ordered to take place which will affect the Western Union employes by next Monday, just as the railroad strike was called in September, when the House

rushed through the Adamson Bill and the President signed it on Sunday, when the strike was called for Monday, Labor Day. We were not in war then and we are now."

(Page 9477.)

"Mr. Griffin: I notice that you say 'that just compensation shall be made for such *supervision,* possession, control or operation.' Now, is it in contemplation that in the event that the President decides to supervise the properties compensation shall be given to the companies?

* * * * *

Mr. Sims: I do not think there is the remotest possibility of the government's taking supervision because they are now supervised by different states."

(Page 9478.)

Mr. Montague (Virginia, a member of the committee), offered the proviso amendment, which was enacted in the resolution.

"Mr. Esch: Is that language the language of the railroad act?

Mr. Montague: It is except that the language of the railroad act is 'transportation of troops, war materials and government supplies.' Of course, that language is inapplicable to this bill, and I simply used the language 'Government communications,' which would embrace all communications by wire or telephone.

Mr. Fess: Will not the amendment operate as a limitation, so that the President taking over the telephone and telegraph lines under the authority granted must take them over subject to the limitations attached?

Mr. Decker: That is true, and I make the suggestion that it is true of the one we just adopted here, and it is far reaching.

Mr. Montague: Does the gentleman carry in his mind the distinction between regulation and